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ABSTRACT

The first two court approved desegregation cases involving graduate and professional public schools during 1935-1940 are discussed. These cases demonstrate a shift in emphasis from segregated to desegregated public graduate and professional schools. The court invoked the Equal Protection Clause of the Fourteenth Amendment in both Maryland and Missouri cases. In Maryland, Donald Gaines Murray, a black Maryland resident and college graduate who was qualified for admission to the University of Maryland Law School was denied admission, apparently on the basis of his race. The school offered the applicant an out-of-state scholarship to any other graduate law school. The State Supreme Court ruled that Murray must be admitted since he was qualified and because the state provided only one law school. In Missouri, Lloyd Gaines, a qualified, black college graduate was denied admission to University of Missouri Law School. This case was finally decided by the U.S. Supreme Court, which ordered Gaines to be admitted. Both cases emphasized equality and raised a number of questions, including: is it unconstitutional for a person to travel to another state to obtain an education available within the state, and is a separate graduate/professional school equal because a state erects one as a minority school? (SW)

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DESEGREGATING GRADUATE AND PROFESSIONAL PROGRAMS IN PUBLIC UNIVERSITIES, 1935 - 1940: THE APPLICATION OF THE FOURTEENTH AMENDMENT

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by Joseph D. Martin, Jr.

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INTRODUCTION

Judicial response has been a major determinant in implementing or impeding the ideal of equality of opportunity in public education. [1.] Both the Brown (1954) and Bakke (1978) cases are examples of judicial determination performing such a function. And both decisions are indicative of the court's capacity to confront conflicting ideologies in a legal forum and issue a decision which calls for conforminty to that which may be equally unpopular to all.

1. Writer's footnote : The role of education as an opportunity for all is expressed in Edmund W. Gordon's article, "Toward Defining Equality of Educational Opportunity" in a book called On Equality of Educational Opportunity by Mosteller and Moynihan (1972), pages 423-434. Robert G. McCloskey's, The American Supreme Court (1960), shows the court's new position in public education. See pages 215-217 for a discussion on two cases and the opinions of two Justices with two separate perspectives.

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There are many who believe that the first court approved segregation - desegregation opinions were rendered as a result of the Plessy (1896) and Brown (1954) cases respectively. And although these two cases caused controversy they were not, according to history, the first such cases.

In 1849, the Supreme Judicial Court of Massachussetts first affirmed the idea of "separate but equal" by endorsing the actions of the Boston Primary School Committee,who refused to admit a Negro child to an all white public school. By not declaring the Committees action illegal, the court approved segregation and thus began America's first segregated public school system in Boston, Massachussetts.

Following the Dred Scott (1857) decision [2].

2. Derrick A. Bell's, Race, Racism, and American Law for a discussion of Dred Scott v. Sanford 60 U.S. 393 (1857) pages 2-22 is excellent. The High Court asserted that (1) there existed a distinction between Indians and Blacks. The former were viewed as a foreign power, the latter were without soverign status; (2) blacks could not become naturalized citizens; (3) a State could not confer citizenship beyond its boundary and therefore, could not convey rights, privileges, and immunities recognized by the Constitution of

and the Plessy (1896)case, the Supreme Court issued three rulings in the field of education which only served to further eclipse the ideal of equality of opportunity. This was tragic because in Clark v. Board of Directors 24 Iowa (1868)and Board of Education of Ottawa v. Tinnon 26 Kansas 1 (1881) the court's gave a clear indication that a shift away from Roberts (1849) occured and thus permit racial integration in public schools.

In the first ruling, Cumming v. Richmond County Board of Education, 175 U.S. 528,(1899) the High Court rejected black plantiffs request to close down the county school system because taxes levied from them did not support a separate school for blacks.

In 1908 and 1927 respectively, the Court ruled that segregation was applicable to all education facilities, public and private, if states so desired and that non-Negroes,who were also non-whites, had to attend all Negro schools.

the United States; (4) blacks had no legal rights and were considered as property and (5) the Constitution did not include or intend to mean blacks as persons because it contradicted the Declaration of Independence.

Berea College v. Kentucky 211 U.S. 45 (1908) and Gong Lum v. Rice 275 U.S. 78 (1927).

During the age of Roosevelt anti-segregationist launched two legal assualts to reverse the affects of court approved segregation in America. The targets were two state supported graduate and professional law schools. Both were located within border states in the south, Maryland and Missouri. The first court petitions were filed in 1935 and 1936 respectively.

Donald Gaines Murray, a citizen of Baltimore and a graduate of Amherst College with a Bachelor of Arts degree, applied for admission to the University of Maryland Law School as a daytime student. Although he was otherwise qualified, the Registrar denied him admission apparently on the basis of his race.

Murray appealed the Registrar's decision to the Universities' President and Board of Regents. They refused to admit him and offered him an out-of-state scholarship to any other graduate law school where he could pursue his career goals without further impediments or delays. After refusing their offer because he wanted to remain in Maryland, Murray applied to the

courts of Baltimore City for a writ of mandamus which would have compelled the school to admit him. After hearing the arguments the court ruled in favor of Murray and the University promptly appealed to the Maryland State Supreme Court.

Attorney's for the University argued that Murray should not be admitted to the law school because it was not a government agency and is therefore not required to give equal rights as prescribed by the Equal Protection Clause of the Fourteenth Amendment. If the court felt that the University were an agency, then his denial of admission was constitutionally permissible (Plessy v. Ferguson 163 U.S. 537) in an institution of higher education where a state desired to practice segregation (Berea College v. Kentucky 211 U.S. 45).

Further, they argued, that the University had acted as it had always acted since its inception.[3]

3. See: "Colored Students Ruled Out No More Will Be Admitted To The Maryland Law School" in the New York Times, September 15, 1890, page 1. This article refutes the testimony of Roger Howell, Dean of the Maryland University Law School. Under direct examination Dean Howell stated that he had no knowledge of

Since no separate law school was established for blacks within Maryland, equal treatment had been accorded by the statutory provisions for scholarships to out-of-state schools. If equal treatment had not been accorded then the remedy is to open a separate school for blacks and, thereby, be in compliance with the doctrine of "separate but equal" as expressed through the Plessy (1896) and Gong Lum (1927) cases.

Murray's attorney's [4] argued that as of 1920 the University was no longer a private school and was, therefore, subject to the Equal Protec-

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blacks ever having attended the law school in the 1890's and felt that such statements could be attributed purely to heresay. Further, he felt that the law school had acted as it had always acted in denying Murray admission to it.

4. Writer's footnote: The attorney's for Murray were The Honorable Thurgood Marshall, now an Associate Justice on the Supreme Court of the United States and Charles Hamilton Houston, who was Marshall's mentor and Dean of Howard University Law School. Kluger's, Simple Justice, gives a detailed account of the impact and influence of Houston and his work, pages 105-139. Also, there is a recent work on Houston by Genna Rae McNeil, Groundwork, that further chronicles his life. He was the first black attorney to win a case before the Supreme Court as an N.A.A.C.P. counsel. He also persuaded his students to become social engineers for the cause of equality in America.

tion Clause of the Fourteenth Amendment because it was the receipient of public funds to finance a public institution.

Further, they argued that there was no statutory authority, expressed or implied, to exclude blacks from the University. When the University offered Murray an out-of-state scholarship they were performing an unauthorized legislative function and were functioning as a legislative body. The law states that only the State Legislature can appropiate funds for public education.

Finally Murray's lawyer's argued that the University's rejection of a qualified applicant constituted a further violation of the Equal Protection Clause of the Fourteenth Amendment because their client's rights, privileges, and immunities as a citizen of Maryland had been abridged.

The Maryland State Supreme Court ruled in favor of Murray stating that the lower court had ruled correctly in issuing the writ of mandamus because the State provided only one law school. Therefore, Murray must be admitted because he was otherwise qualified.

The State Supreme Court did not agree with the University's argument that the out-of-state scholarship was a sufficient expression to satisfy Constitutional requirements of the Equal Protection Clause. If Maryland intended to separate the races according to the Plessy (1896) doctrine then they must provide equal provisions for both groups within their jurisdiction. On that the law was quite clear:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. 5.

Therefore, Murray became the first court approved school desegregation case involving a public higher education graduate and professional school. It signaled a judicial shift from the Plessy (1896) principle to an emphasis on equality.

5. Quoted, Fourteenth Amendment to the Constitution of the United States.

In Missouri, Lloyd Gaines, a graduate of Lincoln University in Lincoln, Missouri, which was the state supported black college, applied to the University of Missouri Law School for admission as a student in 1936. Although he was otherwise qualified, he was denied admission presumably on the basis of his race, on the basis of the public policy of the State, and on the grounds that such an admission would constitute a violation of the United States Constitution. Gaines applied to the Circuit Court of Saint Louis for a writ of mandamus to compel the University to admit him as a student in the law school.

The attorney's for Gaines argued that their client should be admitted to the law school because the public policy of the State did not require the separation of the races in public institutions of higher education.

Further, as a taxpayer and a citizen of the State, he had a proprietary interest in the University of Missouri. And since it was a public school using public funds he was entitled to attend there.

Too, they avered that their client would be denied professional advantages derived and enjoyed by those who attended the State law school and practice law within the State as opposed to those who go out of state to law school and, who upon returning, attempt to establish a legal practice.

Finally, Gaines' attorney's cited the then recent ruling of Maryland v. Murray (1935) that rejected the out-of-state scholarship arrangement and invoked the Equal Protection Clause of the Fourteenth Amendment.

The University's attorney's argued the action to deny the plantiff admission to their law school did not violate the Equal Protection Clause of the Fourteenth Amendment because the legislature had established a separate school for blacks at Lincoln, from which Gaines had graduated. In not applying to Lincoln University for law training, the University argued, he did not avail himself of the opportunity to receive consideration for an out-of-state scholarship that had been established by the Board of Curators in accordance with the legislature.

Finally the University argued that the Murray (1935) case was not applicable to this situation because their respective State legislatures were structured radically different.

Maryland did not have an established out-of-state scholarship arrangement with adjacent states for the purposes of higher education. Nor did they have an established structure, such as a Board of Curators, to carry such work out.

The Circuit Court rejected Gaines' petition. He appealed to the Missouri State Supreme Court and did not receive a favorable ruling there either. In fact the State Supreme Court felt that the arrangement with adjacent states for blacks to go out-of-state to obtain a legal education was an adequate provision pending the establishment of a law school at Lincoln.

Gaines appealed to the Supreme Court of the United States and the case was accepted as certiorari. It was argued November 9, 1938 in Washington. One month later the High Court announced their decision, one which proved to be a historic and a further indication that a judicial shift from Plessy (1896) was in progress.

In a six to two decision the High Court said that the lower courts ruled erroneously on two aspects of the case. First, the Court held that the Board of Curators, although legislatively empowered to grant out-of-state scholarships, could not guarantee or insure the admission of students who received such scholarships to out-of-state schools.

Next, the Equal Protection Clause of the Fourteenth Amendment had been violated since there was no provision made by Missouri for a separate but equal law school facility for black students. Therefore, the Court ordered that Gaines be admitted saying:

> We are of the opinion that the ruling was error, and that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State.
>
> The judgment of the Supreme Court of Missouri is reversed and the case is remanded for further proceedings not inconsistent with this opinion. 6.

But the dissenters disagreed.

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6. Joseph Tussman, editor, The Supreme Court on Racial Discrimination (New York: Oxford Uni - versity Press, 1963), pages 29 & 30.

Pierce Butler and James McReynolds reminded the Court that the decision was an intrusion into the internal affairs of a State and as such, was setting a dangerous precedent. Quoting the words of Chief Justice Taft's opinion in Gong Lum, they said "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear". 7.

For them, that the State has provided an opportunity to study out-of-state sufficiently satisfied all constitutional requirements:

> The problem presented obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through theorization inadequately restrained by experience. 8.

Therefore, for the dissenters, the State should be left to conduct and regulate its own affairs. The University may abandon the law school altogether rather than desegregate. This would hurt both races.

7. Ibid, page 30.

8. Ibid, page 30.

STATEMENT OF THE PROBLEM

In both the Murray (1935) and Gaines (1938) cases the court's gave a clear indication of a judicial shift away from the Plessy (1896) principle and were now emphasizing equality. Harris says that "Jim Crow" was being judicially buried and that this was the

> ... most important development in the Supreme Court's application of constitutional equality and also one of the major domestic events in the twentieth century...the Court's condemnation of racial segregation and its reversal of the separate but equal formula. 9.

And this reversal was going to make an impact on public graduate and professional education as well as in the lower levels of public education.

The problem which this writer will investigate is what factors affected the court's in their decision to invoke the Equal Protection Clause of the Fourteenth Amendment in graduate and professional public schools and how did this affect minorites in terms of higher education opportunities ?

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9. Robert Harris, The Quest for Equality. (Baton Rouge, La. : Louisiana State University Press, 1960), page 130.

DELIMITATION OF THE STUDY

This study will confine itself to a specific time period, 1935 - 1940 and will address the first two court approved desegregation cases involving graduate and professional public schools.

JUSTIFICATION FOR THE STUDY

There is a need to study the role of the court's in resolving the kinds of constitutional questions and issues that the Murray (1935) and Gaines (1938) cases have raised and the shift in emphasis from separate to equal in the field of public higher education. Is it unconstitutional for a person to travel outside of their own state borders to obtain an education which is available to them within the same state ? Do financial appropiations, provided by the state, have to be systematically distributed equally in a dual school system ? Is the establishment of a separate graduate or professional school equal because a state erects one at a minority school ? Were there special privileges or advantages enjoyed by some at the expense of others ? .Did anyone receive benefits as a result of this ?

There exists a body of literature that speaks about education and the relationships that can result where segregation occurs. What does not exist is a body of literature that shows when the court's shifted their emphasis from separate and segregated to equal or desegregated in both public and private schools, as the court's invoked the Equal Protection Clause of the Fourteenth Amendment.

Langston Hughes' work on the N.A.A.C.P., Fight For Freedom is an excellent example of the minute attention scholars have given to Murray and Gaines. [10] This is most regretable because a major portion of history is being

10. Langston Hughes, Fight For Freedom (New York: W.W. Norton, Inc., 1962) pages 135 & 136. Comprehensive Affirmative Action for Equal Educational Opportunity in the Racially Isolated and Predominantly White Suburban School District by Professors Howard, Duff, and Poole of the University of Pittsburgh made no mention of the instant cases in a discussion on the beginning of the struggle for equal education. Only Kluger's work, Simple Justice, gives extensive attention to the instant cases and correctly so because these were the first cases at the higher education graduate and professional school level. Hence, it was in 1935 and not 1954 that a judicial shift in education occured.

neglected. For the action that was taken by the court's in the instant cases constituted a new policy towards segregation was being instituted. And that is why this study is being undertaken.

That the court's play a major role in defining policy is obvious from Richard Neely, who is the immediate past Chief Justice of the West Virginia State Supreme Court. According to Neely court's govern America not only by the legislative process but also through the interpretation of federal and state constitutions and by establishing policies as a result of judicial decisions that are made in the public interest :

> Written opinions are widely circulated among lawyers and trial judges, all but the most recalcitraint of whom fall in line with the higher court mandates. However, any higher court is always dependent upon the good will of the lower courts for the effective execution of the policy which it makes.[11.]

And often such policy encumbers and is not advantageous to a person or persons in this society such as a Donald Gaines Murray or a Lloyd Gaines.

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11. Richard Neely, How Courts Govern America (New Haven : Yale University Press, 1981), page 192.